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THEORY OF RELATION BACK IN ADOPTION AND PRIOR SURRENDER.

It has been held by a long catena of decisions of the Bombay High Court that a surrender by a Hindu widow of the whole of her estate and interest in the property of her deceased husband to a person or persons entitled in reversion operates to defeat a subsequently adopted son, *Rama Nana* v. *Dhondi Murari*[1], *Yeshwant* v. *Antu*[2], *Pandurang* v. *Ishwar*[3], *Krishn Mhatarba* v. *Baban*[4], *Babanna* v. *Channappa*[5], *Shantaram* v. *Keru Krishna*[6]. In the first of these decisions, which is also the earliest, the conclusion is rested on two grounds : (i) On surrender the estate vests in the next heir as an estate of inheritance and an adoption by a widow cannot divest any estate of inheritance unless such estate is at the time of the adoption vested in the adopting widow herself. (ii) It is not merely an alienation for necessity but any transfer within the competency of the limited owner that would bind the adopted son and surrender is such a transfer. With great respect, it may be stated that neither of these grounds is now tenable. No doubt the view had once prevailed not merely that an adoption by a widow cannot divest any estate vested in a person other than the adopting widow herself but that the power of adoption itself would be incapable of execution, *Bhoobun Moyee* v. *Ram Kishore Acharjee*[7]. This view has now been rejected. In *Amarendra Man Singh* v. *Sanatan Singh*[8], the Privy Council after a review of all the authorities has expressly laid down that the validity of an adoption has nothing to do with the " question of vesting or divesting of property " and that the only limitation on the exercise of a power of adoption is that where the duty of providing for the continuance of the line for spiritual purposes which was upon the father and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow the mother's power is gone. In *Anant* v. *Shankar*[9], the Privy Council has shown how the principle operates where the adoption is by the widow of a predeceased coparcener. The observations of the Nagpur High Court in *Bajirao* v. *Atmaram*[10]—" We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother, if that mother in the way of nature or in the way of law brings in a new male member "—were approved. The Privy Council went on to point out, overruling *Balu Sukharam* v. *Lahoo Sambaji*[11], that if an adoption is valid it cannot be denied effect and a validly adopted son can recover the property from any person in whom it had vested by inheritance or had passd by reverter or in the way of survivorship. For " it is to be remembered that the adopted son is the continuator of the adoptive father's line exactly as an aurasa son and that an adoption so far

1. (1923) I.L.R. 47 Bom. 678.
2. (1934) I.L.R. 58 Bom. 521.
3. A.I.R. 1939 Bom. 79.
4. (1943) 46 Bom.L.R. 634.
5. A.I.R. 1947 Bom. 140.
6. (1948) 50 Bom.L.R. 283.
7. (1859) 10 M.I.A. 279 (P.C.).
8. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
9. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 : I.L.R. 1944 Bom. 116 (P.C.).
10. I.L.R. (1941) Nag. 707.
11. I.L.R. (1937) Bom. 508 (F.B.).

as the continuity of the line is concerned has a retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line," *Pratapsingh* v. *Agarsangji*[1]. The first of the reasons urged for the view that a subsequent adoption cannot operate to defeat a prior surrender by the widow has in view of the observations cited *supra* no longer much force.

The second ground underlying the Bombay view was formulated by Crump, J., in *Ram Nana's case*[2], as follows: "An adopted son can challenge any alienation made by the widow without necessity, but it does not follow that necessity is the one validating circumstance. A widow can alienate for necessity, therefore such alienation is valid, but any act of the widow which is within her powers under Hindu Law would apparently stand on just as good a footing. No doubt the adoption dates back to the death of the father, but the adopted son would appear to be bound by acts done by the person in possession of the estate where those acts are within that person's authority. The effect of the surrender by the widow was that the then reversioner took an absolute estate and as the surrender was an act which is by Hindu law within the competency of the widow it is not easy to see any ground on which the adopted son can challenge it." In *Jeku Dula* v. *Bai Jivi*[3], surrender has been treated as a kind of alienation merely. Some decisions have held that article 125 of the Limitation Act would govern a suit to set aside a surrender just like an alienation, *Kanshi Ram* v. *Mt. Chet Kuar*[4], *Sheo Singh* v. *Jeoni*[5]. In *Shantaram* v. *Keru Krishna*[6], it was considered that, if the theory of "relation back" of the rights of the adopted son cannot upset an alienation made by an intermediate male owner of the property with knowledge of the unexercised power of adoption—a position which was laid down in *Veeranna* v. *Sayamma*[7], and was noticed without dissent in *Anant* v. *Shankar*[8], by the Privy Council—it cannot, by parity of reasoning, affect the rights of the surrenderee from the widow prior to the adoption. Referring to the contention "that in such a case the adoption should take effect as a happening of a contingency to which the rights surrendered had always been subject in like manner as an adoption would have had effect if it has been made before the surrender," Sen, J., remarked: "In our opinion the argument is fallacious. In our opinion, the surrender has the effect of vesting an absolute estate in the reversioner and the adoption cannot be regarded as a contingency to which the surrender is subject . . . . . Though a surrender operates by accelerating the reversion, *i.e.*, the succession, it would appear to operate not as a case of succession but as an act of alienation." Two comments may be made. To regard a surrender as an alienation or conveyance is not correct. Secondly, even so, a clear distinction has been recognised in such matters between cases where third party rights have intervened and cases where the property concerned is still in the family, using that term in its broad sense, the possessor of the property having no special equities in his favour. In the Dayabhaga it is stated[9]: "Therefore those persons, who are exhibited in a passage above cited (section 4) as the next heirs on failure of prior claimants, shall, *in like manner as they would have succeeded if the widow's right had never taken effect*, equally succeed to the residue of the estate remaining after her use of it, upon the death of the widow in whom the succession had vested." The italicised part of the above passage has been regarded by Mookerjee, J., in *Debi Prosad* v. *Golap Bhagat*[10], as subsuming cases of extinction of the widow's interest by renunciation, remarriage and the like and as affording textual support to the doctrine of surrender. Surrender is thus looked upon as a process by which the interest of the limited owner becomes available to the next heir as on her death. From the decided cases it is clear that from early times surrender has been judicially viewed not as an alienation but

1. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778 (P.C.).
2. (1923) I.L.R. 47 Bom. 678.
3. (1939) 39 Bom.L.R. 1072.
4. (1929) I.L.R. 10 Lah. 237.
5. (1897) I.L.R. 19 All. 524.
6. (1948) 50 Bom.L.R. 283.
7. (1928) I.L.R. 52 Mad. 398.
8. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 : I.L.R. (1944) Bom. 116 (P.C.).
9. Dayabhaga, XI, 1, 59.
10. (1913) I.L.R. 40 Cal. 721 (F.B.).

as a relinquishment by the widow. In *Roy Chowdhury* v. *Joy Monee Dabee Chowdhurain*[1] it was observed : " It admits of no reasonable doubt that under Hindu Law a Hindu lady in possession can relinquish, and by relinquishing anticipate for the reversioners their period of succession." Likewise in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*[2], Garth, C.J., remarked : " What is usually . . . . called a " surrender " of a Hindu widow's estate is more properly a 'relinquishment' of it in favour of her husband's heirs. If she died a natural death, those heirs would succeed ; or if she were to become a byragee or otherwise die a civil death, the result would be the same. And as I take it to be clear that when her husband died, she might, if she had so pleased have disclaimed her estate, there would seem nothing objectionable in her relinquishing her estate at any time in favour of her husband's heirs for the time being after she had once accepted it." In *Debi Prosad* v. *Golap Bhagat*[3], Jenkins, C.J., refers to the principle that " the next heirs' succession can be accelerated by relinquishment " as an " established principle." The position is summed up in *Janaki Nath Ray* v. *Jyotish Chandra Acharjya Chaudhuri*[4], where it is stated : " Though the doctrine (of surrender) has undergone development in recent years, yet its basis remains unaltered, namely, that it is the self-effacement by the widow or the withdrawal of her life-estate which opens the estate of the deceased husband to his next heirs on that date." Similarly, in *Bhagwat Koer* v. *Dhanukdhari Prasad*[5], the Privy Council has pointed out that the opening of the estate to the next heirs of the husband by the widow can be achieved by any process having that effect provided that there is a total and *bona fide* renunciation of the widow's right to hold the property. Surrender is thus nothing but a 'relinquishment,' 'renunciation' or 'self-effacement' by the widow. A relinquishment is altogether different from a conveyance or alienation, *Subbanna* v. *Balasubbareddi*[6]. It is true that in *Behari Lal* v. *Madho Lal*[7], in describing a surrender the Privy Council used language containing a mix up of the ideas of relinquishment and conveyance. It was there stated : " It may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. It was essentially necessary to withdraw her own life-estate so that the whole estate should get vested at once in the grantee." Likewise certain remarks in *Rangaswami Goundan* v. *Nachiappa Goundan*[8] have been regarded by Sen, J., in *Shantaram* v. *Keru Krishna*[9], as showing that in the opinion of the Privy Council surrender may be viewed as an act of alienation. Turning to *Rangaswami Goundan Case*[8], at more than one place, it is found that the Privy Council has emphasised that surrender is essentially an act of renunciation by the widow and is not to be confounded with alienation and that the distinction between the two should always be kept in view. Thus it is stated by Lord Dunedin : " Here arises that distinction which, as Seshagiri Ayyar, J., most justly observed in the present case, will, if not kept clearly in view, inevitably lead to confusion—the distinction between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain specific purposes which is the second." At another place Lord Dunedin observed : " But in any case it is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree, if more than one at the moment. That is to say, she can so to speak, by voluntary act operate her own death." Finally it is stated : " As already pointed out, it is the effacement of the widow—an effacement which in other circumstances is effected by actual death or civil death—which opens the estate of the deceased husband to his next heirs at that date." The reference to surrender as " conveying absolutely " in *Behari Lal's case*[7], in only a statement of the eventual result, the accrual of a new title, and not an identification of the process with conveyance.

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1. (1864) 1 W.R. 98, 99.
2. (1884) I.L.R. 10 Cal. 1102, 1108 (F.B.).
3. (1913) I.L.R. 40 Cal. 721 (F.B.).
4. I.L.R. (1941) 1 Cal. 234, 260.
5. (1919) I.L.R. 47 Cal. 466 : L.R. 46 I.A. 259 (P.C.).
6. (1945) 1 M.L.J. 140 : I.L.R. (1945) Mad. 610 (F.B.).
7. (1891) I.L.R. 19 Cal. 236 (P.C.).
8. (1918) 36 M.L.J. 493 : L.R. 56 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
9. (1948) 50 Bom.L.R. 283.

The remarks of the Privy Council in *Vytla Sitanna* v. *Marivada Viranna*[1], are too clear to leave any doubt on the point. It is there observed : "The basis of the doctrine of surrender is the effacement of the widow's interest and not the *ex facie* transfer by which such effacement is brought about. The result is merely that the next heir of the husband steps into the succession in the widow's place." The question whether a surrender is a conveyance in any sense of the term is fully examined in *Venkatarayudu* v. *Narayanayya*[2], and answered in the negative. In the course of his judgment Krishnaswami Ayyangar, J., observed : "Does a surrender by a Hindu widow to her immediate reversioners amount to a conveyance, and to a conveyance by her of her property to the surrenderees ? We are clearly of opinion that it does not. It is settled that the true view of surrender under Hindu Law is that it is a voluntary act of self-effacement by the widow having the same consequence as her death in opening up the succession to the next heirs of the last owner. The intermediate estate is merely extinguished and not transferred and the law then steps in to accelerate the succession so as to let in the next reversioners. The surrender conveys nothing in law ; it is purely a self-effacement, which must of necessity be complete . . . . . The fiction of a civil death is thus assumed when a surrender takes place ; and when the reversioners come in they come in in their own right, as heirs of the last owner, and not as transferees from the widow. The principle is not displaced by a reasonable provision being made out of the estate for the maintenance of the widow, as it is settled that a reservation of this character does not detract from the validity of the surrender." The decisions cited show conclusively that a surrender is not to be regarded as a conveyance or alienation of property. The analogy of the competency of an alienation by an intermediate male-holder of the property with knowledge of the existence of an unexercised power of adoption by the widow is unavailing. Even otherwise, in the case of an alienation there is no question of the acceleration of the succession of the next heir of the last full owner.

Even assuming that a surrender may be regarded as an alienation, still it is apparent that all alienations do not and cannot stand on the same footing for purposes of the "relation back" of the rights of the adopted son. In the case of a partition of joint family property among the surviving coparceners and a subsequent adoption by the widow of a predeceased coparcener, it has been held that though a partition is analogous to an alienation in some respects, still the adopted son can re-open the partition, *Sankaralingam* v. *Veluchami*[3]. There is no reason to regard the case of a prior surrender followed by a subsequent adoption differently in regard to the rights of the adopted son. In both cases the transaction is essentially a sort of family arrangement and the property does not travel outside the family. Also as stated by the Privy Council in *Pratapsing* v. *Agarsangji*[4], "it may be that if a Hindu widow lies by for a considerable time and makes no adoption and the property comes into the possession of some one who would take it in the absence of a son natural or adopted, and such person were to create rights in such property within his competency whilst in possession, in such a case totally different considerations would arise." In the case of a surrender no third party rights intervene. The surrenderee has no equity in his favour. The transaction is not one for consideration. If the surrenderee from the widow had created rights in favour of a third party the subsequent adoption by the widow cannot prejudice or disturb such rights. But where the property is with the surrenderee himself there seems to be no reason why the subsequently adopted son cannot reach the same. The reasons mentioned in the Bombay rulings for holding that in such cases the subsequent adoption cannot operate to defeat a prior surrender have lost their force in view of the later developments in the law of adoption evaluating the adopted son's rights.

S. VENKATARAMAN.

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1. (1934) I.L.R. 57 Mad. 749 (P.C.).
2. (1941) 1 M.L.J. 349 : I.L.R. (1941) Mad. 551.
3. (1942) 2 M.L.J. 678 (F.B.).
4. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778 (P.C.).